CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 145

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

vs.

J. N. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1945
CERTIORARI GRANTED OCTOBER 8, 1945

INDEX.

	PAGE
Docket Entries	1
Petition	3
Exhibit "A"—Letter, Commissioner to J. N. Flowers, dated 9/3/43, with Statement attached	7
Answer	12
Memorandum Findings of Fact and Opinion	14
Decision, entered 9/7/44	22
Motion of Petitioner to set aside and Vacate Decision and enter decision for Petitioner, Denied	22
Petition for Review	27
Assignments of Error	29
Notice of filing of Petition for Review	32
REVISED STATEMENT OF EVIDENCE	33
Case called for hearing, etc.	33
Evidence for Petitioner: Testimony of James N. Flowers	33
Agreement of Counsel as to Statement of the Evidence	53
Order approving Revised Statement of Evidence	53
Praecipe for Record	53
Clerk's Certificate, The Tax Court of the U. S.	56

	PAGE
Minute entry of argument and submission	57
Opinion, Holmes, J.	57
Judgment	60
Clerk's certificate	60

Order allowing certiorari	61

DOCKET ENTRIES.

J. N. FLOWERS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 3539.

Appearances:
For Taxpayer: J. N. Ogden, Esq.,
For Comm'r: James L. Backstrom, Esq.

1943

Dec. 1—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 1—Copy of petition served on General Counsel.

1944

Jan. 20—Answer filed by General Counsel.

Jan. 20—Request for Circuit hearing in New Orleans, filed by General Counsel.

Jan. 24—Notice issued placing proceeding on New Orleans, La., calendar. Service of answer and request made.

Feb. 12—Motion for hearing at New Orleans, La., beginning 2/21/44 filed by taxpayer. 2/14/44 Granted.

Feb. 15—Hearing set February 21, 1944 in New Orleans, La.

1944

Feb. 23—Hearing had before Judge Turner on the merits. Submitted. Ta .payer's brief due 4/8/44. Respondent's brief due 5/8/44. Taxpayer's reply brief due 5/29/44.

Apr. 5—Motion for extension of 45 days to file taxpayer's brief, filed by taxpayer.

Apr. 18—Order extending time to 5/25/44 to file petitioner's brief and also respondent's brief and 15 days to file reply briefs, entered.

Apr. 19—Transcript of hearing 2/23/44 filed.

May 6—Motion to correct transcript filed by taxpayer. 5/9/44 Granted.

May 25—Brief filed by taxpayer. 5/26/44 Copy served.

May 25—Brief filed by General Counsel. Served 5/26/44.

June 5—Reply brief filed by taxpayer. 6/5/44 Copy served.

Aug. 7—Memorandum findings of fact and opinion rendered. Judge Turner. Decision will be entered for respondent. Copy served.

Aug. 7—Decision entered. Judge Black. Div. 15.

Sept. 6—Motion to set aside and vacate decision and enter decision for petitioner filed by taxpayer. 9/11/44 Denied.

Oct. 11—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by taxpayer.

Oct. 11—Proof of service filed by taxpayer.

Oct. 27—Statement of evidence lodged, proof of service attached.

Oct. 27—Precipe filed by taxpayer, proof of service thereon.

Nov. 20—Revised statement of evidence lodged.

Nov. 23—Revised statement of evidence approved and ordered filed.

3

PETITION.

Received Dec. 1, 1943.

Filed Dec. 1, 1943.

The Tax Court of the United States.

J. N. Flowers, Petitioner,
v. Docket No. 3539.
Commissioner of Internal Revenue, Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated September 3, 1943, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at 1505 North State Street, Jackson, Mississippi. The returns for the period here involved were filed with the Collector for the State of Mississippi.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on September 3, 1943.

3. The taxes in controversy are income taxes for the calendar years 1939 and 1940 and in the amount of $591.07.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the tax liability of the petitioner for the calendar year 1939, the Commissioner erroneously disallowed a deduction of $900.00 representing traveling

expenses of petitioner (including the entire amount expended for meals and lodging) while away from home in the pursuit of his trade or business. The Commissioner contends that the expenses are not allowable expenses under Section 23(a) of the Code and that said expenses are unallowable "personal, living, or family expenses" within the meaning of Section 24(a)(1) of the Code.

(b) In determining the tax liability of the petitioner for the calendar year 1940, the Commissioner erroneously disallowed a deduction of $1,620.00 representing traveling expenses of petitioner (including the entire amount expended for meals and lodging) while away from home in the pursuit of his trade or business. The Commissioner contends that the expenses are not allowable expenses under Section 23(a) of the Code and that said expenses are unallowable "personal, living, or family expenses" within the meaning of Section 24(a)(1) of the Code.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) In 1903 petitioner moved himself and his family from Carroll County, Mississippi, his birthplace and where he was engaged in the practice of law, to Jackson, Mississippi, where he established and has ever since maintained his home and citizenship and has engaged in his profession as a lawyer continuously to and including the taxable years here in question.

(b) Since 1906 petitioner has represented the several railroad companies controlling railroad properties now a part of Gulf, Mobile and Ohio System. In 1927 petitioner was offered the position of General Solicitor with the Gulf, Mobile and Northern Railroad Company, which was the company then controlling the said properties. The principal offices of this company were located at Mobile,

Alabama, where there was maintained for petitioner an office as a general officer of the company.

(c) As a condition to his acceptance of the position of General Solicitor, petitioner was permitted to continue to live and maintain his home in Jackson, Mississippi, as well as his membership in his law firm at that place, but, however, petitioner was required to defray all expenses incident to such trips as he might make between Jackson and Mobile and all living expenses while in Mobile. Petitioner would not accept the position unless he could continue to make his home and retain his business and professional connections in Jackson, Mississippi, and it was agreeable with the railroad that he do so. Jackson is the Capital of the State and the most important point in Mississippi on the railroad employing petitioner.

(d) In 1930 petitioner was elected to the position of General Counsel of Gulf, Mobile and Northern Railroad Company and later to the position of Vice President and General Counsel of said company, which is the position he now holds with Gulf, Mobile and Ohio Railroad Company, the successor corporation. These several positions had and held by petitioner were and are from year to year subject to annual election by the Board of Directors.

(e) During the entire period from 1927 to and including the taxable years in question petitioner maintained, used and occupied an office in connection with his law firm in Jackson, Mississippi, part of the expense of which was borne by the railroad company and in which a substantial portion of the business of the railroad company was transacted and in which petitioner transacted his own personal business. During this entire period there was available to petitioner an office located in the general offices of the railroad company at Mobile and which was

entirely maintained by the railroad company and which was used by petitioner in transacting business of the railroad company when petitioner was in Mobile.

(f) The amount of time spent by petitioner in his office in Jackson, Mississippi, in his office in Mobile, Alabama, and elsewhere, and the volume of work performed at any one place by petitioner under his employment with the railroad company was, is and has always been dependent upon changing circumstances and varies from year to year. Decisions as to how and where his duties may best be performed are largely within petitioner's discretion.

(g) The entire amount of $900.00, claimed by petitioner as a deductible expense in his personal income tax return for the year 1939 and which has been disallowed by the Commissioner, represents petitioner's traveling and living expenses incident to trips between Jackson, Mississippi, and Mobile, Alabama, and while in Mobile in the pursuit of his employment by the railroad company.

(h) The entire amount of $1,620.00, claimed by petitioner as a deductible expense in his personal income tax return for the year 1940 and which has been disallowed by the Commissioner, represents petitioner's traveling and living expenses incident to trips between Jackson, Mississippi, and Mobile, Alabama, and while in Mobile in the pursuit of his employment by the railroad company.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that there is no deficiency due from the petitioner for the years 1939 and 1940.

(Sgd.) J. N. OGDEN,
(J. N. Ogden)
Counsel for Petitioner.

J. N. Ogden,
104 St. Francis Street,
Mobile, Alabama.

VERIFICATION:

State of Alabama,
County of Mobile, ss.

J. N. Flowers, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

(Sgd.) J. N. FLOWERS.
(J. N. Flowers)

Subscribed and sworn to before me this 29th day of November, 1943.

(Sgd.) EVELYN T. SPOTSWOOD,
(Seal) (Evelyn T. Spotswood)
Notary Public.

My commission expires October 7, 1946.

EXHIBIT "A".

Form 1279 SN-IT-7

Office of Internal Revenue Agent in Charge, New Orleans Division.

Treasury Department.

Internal Revenue Service,

New Orleans 12, Louisiana.

(Copy)

September 3, 1943.

Mr. J. N. Flowers,
1505 North State Street,
Jackson, Mississippi.

Sir:

You are advised that the determination of your income

tax liability for the taxable years ended December 31, 1939 and 1940 discloses a deficiency of $591.07, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days, (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, New Orleans, Louisiana, for the attention of ..... The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner.
(Sgd.) By WILLIAM E. LOGAN,
Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver.

JML/lr

Statement.

Mr. J. N. Flowers,
1505 North State Street,
Jackson, Mississippi.

Tax Liability for the Taxable Years Ended December 31, 1939 and 1940.

Income Tax.

Year	Liability	Assessed	Deficiency
1939	$ 937.04	$ 831.85	$ 105.19
1940	3,261.21	2,775.33	485.88
Totals	$4,198.25	$3,607.18	$ 591.07

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated December 22, 1941; to your protest dated April 24, 1942; and to the statements made at the conferences held on November 3, 1942 and February 23, 1943.

The unsubstantiated estimated deductions of $900.00 and $1,620.00, respectively, claimed on your income tax returns for the year 1939 and 1940 on account of "expenses incident to trips to Mobile, Alabama, on business" and "expenses incident to trips to Mobile, Alabama, where main portion of services is rendered" are held to be unallowable "personal, living, or family expenses" within the meaning of section 24(a)(1) of the Internal Revenue Code and not allowable ordinary and necessary expenses under section 23(a) of the Code, as amended by section 121 of the Revenue Act of 1942.

A copy of this letter and statement has been mailed to your representative, Mr. J. N. Ogden, 104 St. Francis Street, Mobile, Alabama, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1939.

Adjustments to Net Income.

Net income as disclosed by return $14,207.66

Unallowable deductions:		
(a) Expenses disallowed	$900.00	
(b) Error in return	1.00	901.00
Net income adjusted		$15,108.66

Explanation of Adjustments.

(a) Estimated expenses incident to trips between Jackson, Mississippi, and Mobile, Alabama, have been disallowed as a deduction from gross income.

(b) This item represents the adjustment of error noted on the face of your return.

Computation of Tax.

Net income adjusted	$15,108.66
Less:	
Personal exemption	2,500.00
Balance (surtax net income)	$12,608.66
Less:	
Earned income credit	1,400.00
Net income subject to normal tax	$11,208.66
Normal tax at 4 percent on $11,208.66	$ 448.35
Surtax on $12,608.66	488.69
Correct income tax liability	$ 937.04
Income tax assessed:	
Original, account No. 20432	831.85
Deficiency of income tax	$ 105.19

Taxable Year Ended December 31, 1940.

Adjustment to Net Income.

Net income as disclosed by return	$21,596.92
Unallowable deduction:	
(a) Expenses disallowed	1,620.00
Net income adjusted	$23,216.92

Explanation of Adjustment.

(a) Estimated expenses incident to trips between Jackson, Mississippi, and Mobile, Alabama, have been disallowed as a deduction from gross income.

Computation of Tax.

Net income adjusted	$23,216.92
Less:	
Personal exemption	2,000.00
Balance (surtax net income)	$21,216.92
Less:	
Earned income credit	1,400.00
Net income subject to normal tax	$19,816.92
Normal tax at 4 percent on $19,816.92	$ 792.68
Surtax on $21,216.92	2,172.06
Total income tax	$ 2,964.74
Defense tax	296.47
Total income and defense taxes	$ 3,261.21

Income and defense taxes assessed:
Original, account No. 20382 ..... 2,775.33

Deficiency of income and defense taxes ..... $ 485.88

JML/lr

14 ANSWER.

Received Jan. 20, 1944.

Filed Jan. 20, 1944.

(Title Omitted.)

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein admits and denies as follows:

1, 2, and 3. Admits the allegations in paragraphs 1, 2, and 3 of the petition.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5—(a). Admits that in 1903 petitioner moved himself and his family from Carroll County, Mississippi, his birthplace and where he was engaged in the practice of law, to Jackson, Mississippi; denies the remaining allegations in paragraph 5—(a) of the petition.

5—(b). Admits the allegations in paragraph 5—(b) of the petition.

5—(c). Denies the allegations in paragraph 5—(c) of the petition.

5—(d). Admits that in 1930 petitioner was elected to the position of General Counsel of Gulf, Mobile and Northern Railroad Company and later to the position of Vice President and General Counsel of said company, which is the position he now holds with Gulf, Mobile and Ohio Railroad Company, the successor corporation. Denies the remaining allegations in paragraph 5—(d) of the petition.

5—(e), (f), (g), and (h). Denies the allegations in paragraphs 5—(e), (f), (g), and (h) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL, HJF
(J. P. Wenchel)
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:
JAMES L. BACKSTROM,
Division Counsel,
HOMER J. FISHER,
Special Attorney,
Bureau of Internal Revenue.

HJF:mmd. 1/4/44.

16 MEMORANDUM FINDINGS OF FACT AND OPINION.

The Tax Court of the United States.

J. N. Flowers, Petitioner,
v. Docket No. 3539.
Commissioner of Internal Revenue, Respondent.

J. N. Ogden, Esq., for the petitioner.
James L. Backstrom, Esq., for the respondent.

TURNER, Judge:

The respondent determined deficiencies in income tax against the petitioner of $105.19 and $485.88 for 1939 and 1940, respectively. The only issue presented is whether the petitioner is entitled to deductions of $900 and $1,620 taken by him in those years as traveling expenses.

Findings of Fact.

The petitioner resides at Jackson, Mississippi, and filed his 1939 and 1940 income tax returns with the Collector in that city.

The petitioner is an attorney and during the taxable years was employed by the Gulf, Mobile & Northern Railroad and its successor, the Gulf, Mobile & Ohio Railroad. He began the practice of law in Mississipi in 1896. In 1903 he moved to Jackson where he served as assistant attorney general of the State of Mississippi until 1906, when he resigned to enter a law firm in Jackson. Sometime after terminating that connection, he formed a law firm which conducted business in Jackson, and which, since 1922, has been known as Flowers, Brown & Hester.

The petitioner began representing the predecessors of the Gulf, Mobile & Ohio Railroad in 1906, and from that time until about 1918 or 1920, he "tried cases up and down

the road," practically all of them being in Mississippi. His connection from about 1918 or 1920 until 1927 was that of special counsel in Mississippi in which state was located from 80 percent to 90 percent of the company's properties. In 1927 he was elected to the position of general solicitor for the Gulf, Mobile & Northern Railroad by its board of directors. He continued to be elected to that position each year until 1930 when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when, upon completion of the merger of the properties of the Mobile & Ohio Railroad with those of the Gulf, Mobile & Northern and the formation of the Gulf, Mobile & Ohio, he was elected vice president and general counsel.

Since 1903 the petitioner and his family have resided in Jackson. They have resided on the same site since 1912, the petitioner having in 1917 and 1918, built the house in which they now reside. The principal office of the Gulf, Mobile & Ohio Railroad is in Mobile where the principal office of the Gulf, Mobile & Northern was also located. When petitioner was offered the position of general solicitor in 1927, he was not willing to accept it if his acceptance required him to move to Mobile. He had established himself in the practice of law in Jackson, had built his own home and had his personal and business connections there and did not desire to move away. Because of that situation, he requested, before accepting the position of general solicitor, that an arrangement be made whereby he could continue his residence in Jackson. As a consequence, an understanding was entered into between him and the railroad company by which he could continue to make his home in Jackson on condition that he pay his traveling expenses between Mobile and Jackson and pay his living expenses in both Mobile and Jackson This arrangement, which permitted the petitioner to determine for himself the amount of time he would spend in each of the places, continued through the taxable years

involved herein, though at times there has been some complaint about the fact that he did not spend more time in Mobile where his office as general counsel in 1939, and as vice president and general counsel in 1940, was located.

The petitioner's name has been continued in the name of his law firm but he has not participated in the conduct of its business nor shared in its income. The firm has been and continues as division counsel for the railroad company, and the members of the firm discussed with him, when he was in Jackson, any questions relating to railroad business or other matters in which they were interested. The petitioner's employment by the railroad company as general solicitor, and later as general counsel and as vice president and general counsel, did not prohibit him from accepting other legal employment. For a few years following 1927, he had a substantial amount of such employment, but afterwards it became only occasional, and during the taxable years in controversy he had none.

While the railroad company provided petitioner with an office in Mobile, it did not provide him with one in Jackson. His law firm furnished him with office space in Jackson, and he used his own office furniture and fixtures, except a typewriter and a desk for his secretary, which were furnished by the railroad company. The petioner continued to own an interest in the law firm's library, which he used. The railroad company furnished petitioner's Jackson office with telephone service, and paid the expenses, while in Jackson, of petitioner's secretary, who usually accompanied him to that city.

Before the merger, as well as afterwards, the greater portion of the railroad company's properties was located in Mississippi, and the bulk of the litigation in which the company was involved was conducted in that state. Most of the legal business of the company in Mississippi was centered in or conducted from Jackson, but this business was handled by local counsel for the railroad, petitioner's

participation being advisory only and no different from his participation in similar business handled by local attorneys for the railroad in other areas and localities.

The following is a statement by months during the taxable years in controversy of the approximate number of days petitioner spent in Jackson, in Mobile, and elsewhere, together with the number of trips made from Jackson to Mobile, and from Mobile to Jackson:

	Days in Jackson	Days in Mobile	*Days Elsewhere	Trips from Jackson to Mobile and from Mobile to Jackson
1939				
January	20	3	8	1
February	16	2	10	2
March	11	15	5	4
April	13	..	17	..
May	14	17	..	6
June	13	2	15	1
July	15	5	11	4
August	28	3	..	2
September	21	2	7	3
October	24	7	..	6
November	13	3	14	1
December	15	7	9	3
Total	203	66	96	33
1940				
January	25	3	3	2
February	18	9	2	3
March	17	7	7	5
April	8	11	11	5
May	8	4	19	2
June	18	12	..	4
July	15	5	11	3
August	13	7	11	2

1940	Days in Jackson	Days in Mobile	*Days Elsewhere	Trips from Jackson to Mobile and from Mobile to Jackson
September	6	8	16	2
October	13	6	12	3
November	14	15	1	7
December	13	15	3	2
*Total	168	102	96	40

*The days spent elsewhere than in Jackson or Mobile represent time spent in Washington, New York, New Orleans, Baton Rouge, Memphis, and Jackson, Tennessee.

Generally speaking, the petitioner performed his principal work for the railroad company at its main office in Mobile. However, during 1939 and 1940, he devoted practically all of his time to matters relating to the merger of the properties of the Gulf, Mobile & Northern and the Mobile & Ohio, and since it was left to him where he would do his work, he spent most of his time in Jackson. In connection with the merger, one of the companies was involved in certain litigation in the Federal Court at Jackson, and petitioner participated in that litigation.

There was no direct route between Mobile and Jackson. Petitioner nearly always went through New Orleans in making the trip between the two points, and at times spent the night there. As he had a railroad pass he paid no train fare but did have to pay seat or berth fare. The railroad company paid all of petitioner's traveling expenses when he went on business trips to points other than Jackson or Mobile, but it paid none of his expenses in traveling between these two points or while he was at either of those two points.

The petitioner's salary as general counsel in 1939 was $17,000. and as vice president and general counsel in 1940 was $25,536.40.

In his income tax returns for 1939 and 1940, the petitioner deducted $900 and $1,620, respectively, as traveling expenses incurred in making trips between Jackson and Mobile, and living expenses while in Mobile. In determining the deficiencies involved herein, the respondent disallowed the deductions.

Opinion.

The only issue involved is whether, under the circumstances presented, the deductions taken by petitioner in the respective taxable years as traveling expenses between Jackson and Mobile and living expenses while in Mobile, come within the provisions of and are allowable under section 23 (a)(1) of the Internal Revenue Code, or fall within the provisions of section 24 (a)(1), and were properly disallowed by the respondent.

Section 23 (a)(1), *supra*, provides for the allowance as a deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business," while section 24 (a)(1), *supra*, provides that no deduction shall be allowed in respect of "Personal, living, or family expenses."

The position of the petitioner is that, for whatever reason that appealed to him, he was free to make his home wherever he saw fit, and he made it at Jackson; that it was necessary for part of his work to be done in Jackson and part of it in Mobile; that this required him to travel between the two places and in doing so he was traveling on business; that under these circumstances the expenditures incurred in traveling between the two cities and for meals and lodging while in Mobile constituted the kind of expenses which section 23 (a)(1), *supra*, provides shall be deductible. Since 1927 the headquarters of petitioner's employers have been at Mobile, where, during that time, they furnished petitioner with an office for the per-

formance of his duties. Having provided him with an office at headquarters, they did not furnish one elsewhere. During this period his employers did not require him to make his home in Mobile and perform all of his work at the office they furnished him, but permitted him to make his home in Jackson and do part of his work there under a special arrangement entered into at petitioner's request and under which petitioner paid his traveling expenses between the two cities and his living expenses while in each. Apparently the employers regarded such traveling expenses as personal expenses of the petitioner which properly should be borne by him since he preferred to continue making his home in Jackson and do part of his work there instead of moving to Mobile and doing all his work at the office which they were providing at their headquarters. So far as disclosed, the petitioner would have been required to bear the expenses of his own meals and lodging if he had moved to Mobile. So apparently his employers considered that since he continued to reside in Jackson, it was proper that he should pay for his meals and lodging while in both Mobile and Jackson. When petitioner traveled on business for his employers to points other than Mobile and Jackson, they paid his traveling expenses. Petitioner's intimation that his employers required him to travel between Jackson and Mobile on business for them at his own expense is refuted by his testimony to the effect that if he had been in Mobile and a matter came up in Jackson requiring him to go there after which he would have had to return to Mobile, his employers would have been charged with the expenses of the trip.

In support of his position, the petitioner relies strongly on *Coburn* v. *Commissioner*, 138 Feb. (2d) 763, and *Harry F. Schurer*, 3 T. C. 544, in which the taxpayers were allowed deductions for traveling expenses and meals and lodging while away from home. Those cases do not aid the petitioner. The facts in them were materially differ-

ent from those presented here. In each of those cases the taxpayers had for long periods of years maintained homes and resided in the cities in which they had followed their trade or business. During the taxable years involved, they accepted several short-term or temporary employments at places other than the cities in which they resided which employments required their absence from home. The total time spent away from home in each case was substantially less than a year.

The petitioner contends that since he was elected to his employment for only a year at a time, his employment is likewise to be regarded as only short-term or temporary. We think the answer to this is to be found in the fact that he had only one period of employment each year and that was for a full and continuous period of twelve months, and he makes no claim that in accepting the positions which he held with the railroad from and after 1927 he did not in fact look upon it as being continuous in character.

The situation presented in this proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another. In such a situation, expenditures incurred by the taxpayer in traveling between the two cities is a personal expense and not deductible. *Frank H. Sullivan*, 1 B. T. A. 93; *Mort L. Bixler*, 5 B. T. A. 1181; *Jennie A. Peters*, 19 B. T. A. 901; *Walter M. Priddy*, 43 B. T. A. 18. Since, during the taxable years involved herein, the petitioner had no employment aside from that of the railroad companies, and rendered no service to his law firm or to others in Jackson entitling him to income therefrom, we must conclude that the expenditures involved in the instant proceeding represented personal or living expenses, the deduction of which is prohibited by section 24 (a)(1), *supra*.

Enter: Entered Aug. 7, 1944.

Decision will be entered for the respondent.

(Seal)

---

25 DECISION.

The Tax Court of the United States, Washington.

J. N. Flowers, Petitioner,

v. Docket No. 3539.

Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered August 7, 1944, it is

Ordered and Decided: That there are deficiencies in income tax of $105.19 and $485.88 for 1939 and 1940, respectively.

Enter: Entered Aug. 7, 1944.

Signed) J. E. MURDOCK,

(Seal) Judge.

MOTION TO SET ASIDE AND VACATE DECISION AND ENTER DECISION FOR PETITIONER.

26 Received Sept. 6, 1944.

Filed Sep. 6, 1944.

Tax Tax Court of the U. S. Denied. Sep. 11, 1944.

(Signed) BOLON B. TURNER,

Judge.

(Title Omitted.)

Comes now the Petitioner by his attorney, J. N. Ogden, and moves the Court to set aside and vacate the decision

heretofore entered in this cause on August 7, 1944, and to enter a decision herein favorable to Petitioner and responsive to the prayer of his petition, assigning as reasons therefor the following:

(1) The Tax Court erred as a matter of law in that the decision heretofore entered in this cause is founded upon an erroneous construction and interpretation of Section 23 (a)(1) of the Internal Revenue Code and particularly of the word "home" as that word appears in said section, and which construction and interpretation of said statute and the word "home" appearing therein is contrary to the construction and interpretation thereof decided by the Circuit Court of Appeals for the Ninth Circuit in the case of *William R. Wallace, Jr., et ux v. Commissioner,* Nos. 10,574, 10,548, decided July 17, 1944.

Wherefore, it is prayed that this motion be granted.

Respectfully submitted,

J. N. OGDEN,

Counsel for Petitioner.

J. N. Ogden,
104 St. Francis St.,
Mobile, Alabama.

---

27 ARGUMENT IN SUPPORT OF MOTION.

In deciding the case at bar against the Petitioner and in favor of the Respondent, the Court was required to and did hold, as a matter of law, that Section 23 (a)(1) of the Internal Revenue Code and the word "home", as used therein, should be construed as meaning the taxpayer's place of business, employment, or post or station at which he is employed, rather than his domicile or legal

residence, or at the place where he lives, in the ordinary and commonly accepted sense. In short, the Tax Court adhered to its previous construction of this statute and the word "home" as reflected in the following cases which it cited with approval, they being, *Frank H. Sullivan*, 1 B. T. A. 93; *Mort L. Bixler*; 5 B. T. A. 1181; *Jennie A. Peters*, 19 B. T. A. 901; *Walter M. Priddy*, 43 B. T. A. 18. Absent such a construction of the controlling statute, the facts being undisputed, the Tax Court could only have rendered a decision herein in favor of the Petitioner. That is to say, the adherence by the Tax Court to its former construction of the controlling statute furnished the sole support, as a matter of law, for the decision heretofore entered herein in favor of the Respondent.

Heretofore, and on May 7, 1943, in the cases of *William R. Wallace, Jr. v. Commissioner and Ina Claire Wallace v. Commissioner*, 3 T. C. ....., Dockets Nos. 110143, 110144 (CCH Decision 13,182 (M)) this Court had occasion to consider the identical law question presented in the case at bar and there entered a decision to the same effect as the decision entered herein. That is, the Tax Court, on the same principal authorities depended upon by it in the instant proceedings, disallowed the claim deductions of Wallace and his wife because it construed the statute to mean that the claimed deductions could not be allowed since they had not been incurred in traveling away from home, the Tax Court construing the statute to mean that "home" was the place of business, employment, or post or station at which the taxpayer was employed. The Wallaces had established their domicile and legal residence in San Francisco. The expenses in question were incurred by Mrs. Wallace, a motion picture actress, while engaged in making pictures in Hollywood. Following its construction of the statute, the Tax Court determined that the deductions were not allowable since Mrs. Wallace's home, for tax purposes, was in Hollywood where she was working

and not in San Francisco where she was domiciled and had her legal residence. On review of this case by the Circuit Court of Appeals for the Ninth Circuit, that Court held that "the decisions of the Tax Court entered May 7, 1943, being 'clear-cut mistakes of law' are, and each of such decision is, reversed." The mistake found to have been committed by the Tax Court was in the proper construction to be given what the Court of Appeals termed "an unambiguous income tax statute", and in that the Tax Court had construed the statute to mean one thing and the Court of Appeals construed it to mean the opposite. The opinion of the Court is, in part, as follows:

"We have found nothing in section 23 (a)(1) of the Internal Revenue Code or in the earlier legislation from which this code provision is derived which denotes any intent by Congress to attribute to the word 'home' as therein used any unusual or novel meaning.

"Therefore the Tax Court in its effort to differentiate between the conceded 'domicile' and 'legal residence' of both petitioners after their marriage and their 'home' at such times, has, we think, invaded the domain of Congress in construing the term 'home' as used in the statute under consideration as meaning 'the taxpayer's place of business, employment or the post or station at which he is employed.' Had Congress intended that the word 'home' should not be understood and applied in its ordinary sense but rather as meaning the locale of employment of the taxpayer, it would have used a more appropriate term to express such an intent. "A home in relation to the place of abode is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place."

"The clearly expressed purpose of Congress in enacting income tax laws is to impose tax burdens upon the *net*

income of individuals, and in ascertaining such income when Congress has used only literal terms in specifying the allowable deductions from gross income such meaning of deductions must be accepted by the Courts unless such course would lead to absurd results. We can conceive of no such results by giving to the word 'home' in the application of Section 23 (a)(1) of the Internal Revenue Code its normal and customary meaning. On the other hand, to judicially innovate a meaning of 'home' as the taxpayer's 'place of business, employment, or the post or station at which he is employed,' as the Tax Court has done, would, we think, operate to thwart the obvious purpose of Congress to tax *net* income and would in many cases tax the gross instead of the net income of individuals. The Court should function to interdict such a result."

The text of the opinion of the Circuit Court of Appeals for the Ninth Circuit in the *Wallace* case, supra, was not available to Petitioner nor, presumably, to the Tax Court prior to the entry of the decision herein on August 7, last. The *Wallace* case, supra, constitutes the first clear-cut reversal of the Tax Court by a Circuit Court of Appeals on the question involved here, though the Second Circuit in *Coburn v. Commissioner*, 138 F. (2d) 763, indicated quite clearly that had it been necessary for a decision of the case, that Court would have decided the law question just as did the Circuit Court of Appeals for the Ninth Circuit in the *Wallace* case, supra.

Since the Circuit Court of Appeals has decided the law question that controls the case at bar differently from the decision of that question by this Court, is is respectfully urged that this Court set aside and vacate its decision herein and enter a decision in conformity with and on the authority of the *Wallace* case, supra, and in favor of your Petitioner. See *H. C. Gowran, Petitioner v. Com-*

missioner of Internal Revenue, Respondent, 32 B. T. A. 820; *Iola Wise Stetson, Petitioner v. Commissioner of Internal Revenue, Respondent,* 27 B. T. A. 173. See, also, *William R. Stewart, et al., Petitioners v. Commissioner of Internal Revenue, Respondent,* 28 B. T. A. 256. Compare *Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co., et al.,* 7 I. C. C. 513, 547.

Respectfully submitted,
J. N. OGDEN,
Counsel for Petitioner.

J. N. Ogden,
104 St. Francis St.,
Mobile, Alabama.

PETITION OF J. N. FLOWERS FOR REVIEW BY THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT OF A DECISION BY THE TAX COURT OF THE UNITED STATES.

32 Filed Oct. 11, 1944.

(Title Omitted.)

Comes now the Petitioner, J. N. Flowers, by his Attorney, J. N. Ogden, and files his petition for a review by the Circuit Court of Appeals for the Fifth Circuit of the decision of the Tax Court of the United States rendered on August 7, 1944 (Memorandum Opinion in Docket No. 3539), determining deficiencies in the Petitioner's federal income taxes for the calendar years 1939 and 1940 in the respective amounts of $105.19 and $485.88, and respectfully shows:

I.

The Petitioner, J. N. Flowers, is an individual and is a resident citizen of the City of Jackson, Hinds County, State of Mississippi. He filed his income tax return for the year 1939 and the year 1940 with the Collector of Internal Revenue for the State of Mississippi at Jackson, Mississippi.

II.

Nature of the Controversy.

The controversy involves the determination of Petitioner's liability for federal income taxes for the calendar years 1939 and 1940 and turns upon the proper construction and application of Section 23 (a)(1) of the Internal Revenue Code and the definition of the word "home", as used in that section of the law.

During the years 1939 and 1940 and for years prior and subsequent thereto, Petitioner resided and made his home and had a business office in the City of Jackson, Mississippi. During the same period, Petitioner was employed by a railroad company whose principal offices were in the City of Mobile, Alabama, where the said railroad company maintained and provided an office for Petitioner.

In the pursuit of his employment during the years in question, Petitioner traveled back and forth between Jackson, Mississippi, and Mobile, Alabama, staying in Mobile, Alabama, for varying lengths of time. In traveling between the two cities and while staying in Mobile, Petitioner incurred expenses incident thereto amounting to $900.00 in 1939 and $1620.00 in 1940.

In his federal income tax returns for the calendar years 1939 and 1940, Petitioner claimed as an allowable deduction under Section 23 (a)(1) of the Internal Revenue Code his traveling expenses between Jackson and Mobile and his living expenses while in Mobile incurred by him during those years.

Upon examination of the two returns, the Commissioner of Internal Revenue disallowed the claimed deductions for both years and assessed the deficiencies as hereinabove stated and on review by the Tax Court of the United States, the same deficiencies in income tax were found, ordered and decided.

III.

The Petitioner being aggrieved by the findings of fact and conclusions of law contained in the Finding of Fact and Opinion of the Tax Court, and by its decision pursuant thereto, desires a review thereof by the Circuit Court of Appeals for the Fifth Circuit.

IV.

Assignments of Error

The Petitioner assigns as error the following actions and omissions of the Tax Court:

(1) The Tax Court committed a mistake of law in assessing deficiencies in income tax against Petitioner of $105.19 and $485.88 for 1939 and 1940, respectively, by reason of having disallowed Petitioner's claimed deductions of $900.00 and $1620.00 for 1939 and 1940, respectively.

(2) The Tax Court committed a mistake of law in its construction of Section 23 (a)(1) of the Internal Revenue Code and in holding that the word "home", as used in said section, meant place of business, employment, or post or station where employed.

(a) The Tax Court committed a mistake of law in holding that the expenses herein involved fall within the provisions of Section 24 (a)(1) of the Internal Revenue Code and should, therefore, be disallowed.

(4) The Tax Court committed a mistake of law in failing and refusing to allow the expenses involved herein in that the said expenses were and are allowable under Section 23 (a)(1) of the Internal Revenue Code.

(5) The Tax Court committed a mistake of law when it denied Petitioner's timely motion to set aside and vacate its decision herein and enter a decision for Petitioner in conformity with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *William R. Wallace, Jr., et ux v. Commissioner,* .... Fed. (2d) .... (Advance Sheet ...., decided July 17, 1944).

(6) In its Opinion the Tax Court said that ".... he (Petitioner) makes no claim that in accepting the positions which he held with the railroad from and after 1927 he did not in fact look upon it as being continuous in character." This statement has no warrant in the record.

(7) In its Finding of Fact the Tax Court failed to include full and complete statements from the undisputed evidence relating to the following matters deemed by the Petitioner to be pertinent to his theory of the case, to-wit:

(a) The uncertainty of Petitioner's position with the railroad.

(b) Petitioner's reasons for continuing to make his home and maintain his business connections in Jackson, Mississippi.

(c) Petitioner's status as a lawyer; his understanding with his law firm and his connections in Jackson, Mississippi.

J. N. OGDEN,
Attorney for Petitioner.

J. N. Ogden,
104 St. Francis Street,
Mobile 5, Alabama.

---

37 AFFIDAVIT.

State of Alabama,
County of Mobile, ss.

This day there personally came and appeared before me, the undersigned authority in and for the county and state aforesaid, the within named J. N. Ogden, who, after being by me first duly sworn, states on oath that he is Attorney of Record in the above named and numbered cause; that as such attorney he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

J. N. OGDEN.

Sworn to and subscribed before me this the 9 day of October, 1944.

EVELYN T. SPOTSWOOD,
(Seal) Notary Public.

My Commission expires October 7, 1946.

NOTICE OF FILING PETITION FOR REVIEW.

Filed Oct. 11, 1944.

(Title Omitted.)

To: J. P. Wenchell,
Chief Counsel,
Bureau of Internal Revenue,
Washington, D. C.

Please take notice that the Petitioner on the 11 day of October, 1944, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the Circuit Court of Appeals for the Fifth Circuit of the decision of the Tax Court heretofore rendered in the above entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you. This the 11 day of October, 1944.

Respectfully,
J. N. OGDEN,
Attorney for Petitioner.

J. N. Ogden,
104 St. Francis Street,
Mobile 5, Alabama.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this the 11 day of October, 1944.

J. P. WENCHEL, C.A.R.,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

40 REVISED STATEMENT OF EVIDENCE.

Received Nov. 20, 1944.

Lodged Nov. 20, 1944.

Filed Nov. 23, 1944.

(Title Omitted.)

The following is a narrative statement of the oral evidence adduced in the above-entitled cause. The case was heard by the Honorable Bolon B. Turner, Judge of The Tax Court of the United States, at New Orleans, Louisiana, on February 23, 1944. J. N. Ogden, Esq., appeared for the taxpayer, and James L. Backstrom, Esq., for the Commissioner of Internal Revenue.

JAMES N. FLOWERS, the petitioner herein, was called as a witness on his own behalf, and having been duly sworn, testified as follows:

Direct Examination.

I am engaged in practicing law; I first commenced practicing in Carroll County, Mississippi, the latter part of 1896 and continued there to the first of January, 1903. I then went to Jackson, Mississippi, as Assistant Attorney General; and I live now at Jackson, Mississippi. I have never engaged in any other profession or business. I was in the office as Assistant Attorney General for three years and then resigned and went into a firm in Jackson, which lasted about three years, and then I have always had a firm which was styled Flowers, Brown & Hester since about 1922. I am the Flowers of that firm. I belong to the American Bar Association, Mississippi State Bar As-

sociation, and the Hinds County Bar Association, and also pay dues to the Bar Association of the City of New York. In 1925 or 1926, I was president of the Mississippi State Bar Association, and at one time president of the Hinds County Bar Association.

At the time I moved to Jackson in 1903, my family consisted of only a wife; I have one living child. My family lived with me at Jackson through the years 1939 and 1940, which are the years in question. I have lived at 1505 North State Street since 1912. I own my home; and built my present house in 1917 and 1918. I am qualified to vote in Jackson, Mississippi; and have been ever since I have been there. I file my Federal income tax returns at Jackson, Mississippi, and my state income tax returns to the State of Mississippi; and have for all these years. I belong to a church and also to a country club in Jackson, and belonged to them in 1939 and 1940.

I pay a privilege license to practice law to the City of Jackson and the County of Hinds, Mississippi; and that was true in 1939 and 1940.

I began representing the G. M. and N. and its predecessors in 1906, when I went out of office as Assistant Attorney General. I have tried cases up and down the road for a great many years. The bulk of the properties of the G. M. and N. was practically all in Mississippi, and there was a little in Alabama; but I tried cases in Mississippi. About 1918 or 1920, a younger man took over, and then I represented them as special counsel in Mississippi, or my firm did, up until I took the position of general solicitor in 1927 of the Gulf, Mobile & Northern. Its principal office in 1927 was in Mobile, Alabama; it has always been there. The bulk of the property was in Mississippi at that time; there are a few miles in Mobile County, Alabama.

The position of general solicitor is purely a law position, and the appointment is made by the Board of Directors for a period from year to year.

(By Mr. Ogden):

"Q. Mr. Flowers, what, if any, understanding was had with respect to your maintaining your home or continuing to live in Jackson, Mississippi, upon your acceptance of this position?

A. Well, it was understood that I was to continue to live in Jackson, Mississippi, but I would have to pay my expenses incidental to filling the position from my home in Jackson.

Q. What expenses do you mean, for instance?

A. Well, those things it was understood that it would cost me something to travel to Mobile and back and to live in Mobile on the days I was there.

Q. The company did not pay those expenses?

A. No.

Q. Has the company ever paid those expenses?

A. No.

Q. When you are travelling on company business as general solicitor and ever since you have been general solicitor does the company pay your expenses when you travel other than between Mobile and Jackson, and vice versa, and while you are in Mobile?

A. Oh, yes. I should say that I was fairly well established in Jackson; I had lived there practically all the time since I had been there, offering my services as an attorney and the people I knew lived there and I had my home there, and I had gone to considerable expense to fix up that home and my personal and business connections were all there and I would not have been willing to take the position which I did take if it had required me to move to Mobile, and that was understood at the time, that I could live in Jackson; and then, besides I had my firm there and my name is still in the firm and for some years I did have other business on the side, business that did not require trials that would consume time, business that involved what you might say were questions which you could take around with you and work out; and be-

sides, I wanted to keep up my connection as far as I could, so that if I should not be re-elected the next year, I would have something to go to. I could not afford to surrender all that and sever my connections. I did not know one year whether I would be elected the next year or not."

(Witness continuing):

When I accepted this position, the company provided me with an office in Mobile. The law firm has always kept my office—not my very room—I had the same office but we were in another building. My firm has always kept an office for me and I have my own furnishings; I have an interest in the library; I have my own stationary, filing cases, desks and chairs, and bookcases; and everything.

Since I accepted the position of general solicitor in 1927, the railroad has paid nothing towards the expenses of my office in Jackson; but it provided me with the telephone service, so I could always be in touch.

(By Mr. Ogden):

"Q. Did they provide any furniture or anything for stenographic services or make a provision for your stenographer?

A. Yes; they have always provided a typewriter and desk for the use of my help when I was there, and in these years involved my secretary went with me and they paid his expenses when he was away from Mobile, in Jackson; but usually, when I was there, he was there and I spent, of course, the most of my time when in Jackson working on the railroad business."

(Witness continuing):

In 1930, I was given the title of general counsel of the G. M. and N. and of the N. O. G. N., the latter being the

line from Jackson, Mississippi, to New Orleans. On the completion of the reorganization of the Mobile and Ohio and the unification of operations of the properties of that railroad with the Gulf, Mobile and Northern, about the middle of September 1940, I was also given the further title of vice president.

Upon my election as an officer by these railroads from year to year since 1927, there never has been any doubt in my arrangement about where I would live and how my expenses between home and the general office of the company at Mobile would be handled.

It has been left to me as to how much time I would spend in Mobile—there has sometimes been complaint about it; but still, it has been left to me.

(By Mr. Ogden):

"Q. Mr. Flowers, you stated, in general, that you did employ some of your time on matters other than railroad matters? Was that true during 1939 and 1940 and generally throughout the entire period since 1927?

A. I can't say that it has been generally true. While I could not for those years now mention any particular item, for some years after I went on this job I did handle some important matters, but after I had been away so long—I mean away from the office in Jackson so much—why, those things got to be very occasional, but I did discuss matters with the firm from time to time and especially railroad matters. My firm there has, since 1927, been division counsel for the same properties, and I have, of course, on practically all occasions when I am there, I discussed matters pertaining to the railroad with them and any matters that they have that they want to talk with me about, though I might not have any pecuniary interest in the business in hand.

Q. You mean, do I understand from you, then, that your employment with the railroad did not forbid or prohibit you from spending any of your time that you could

without it being to the detriment of your employment by the railroad on matters that did not pertain to the railroad?

A. There was no condition of that kind.

Q. There was no prohibition or condition against it?

A. No prohibition, but I have not taken on anything that would interfere with my performance of my duties on the railroad job."

(Witness continuing):

My type of duty with the railroad has all to do with law; we discuss every sort of question on the railroad. I am responsible for the legal work of the railroad. We have a staff that is made up of lawyers altogether, and then we have our lawyers up and down the line, including division counsel and local counsel. I am responsible for everything that takes place in the legal department, and in no other.

Thereupon, counsel offered and there was received in evidence a schedule showing by days and months for the years 1939 and 1940 the approximate number of days spent by Mr. Flowers in Jackson, Mississippi, and in Mobile, Alabama; and the days spent other than in Jackson and Mobile and the approximate number of trips between Jackson and Mobile, being based on photostatic records of the hotel in Mobile where Mr. Flowers stayed and on copies of expense vouchers when he was not in Mobile, which schedule was marked Petitioner's Exhibit No. 1 and was agreed to as being correct by counsel for respondent. (A summary of such schedule is shown on page 5 of the memorandum findings of fact and opinion of the Tax Court entered herein.)

"Q. Now, during the approximate period of 203 days that you were in Jackson, in 1939, as disclosed by Exhibit

1, what were you doing in Jackson? What was your custom? Why did you spend such a long period of time in Jackson?

A. I think I can answer that as to both years together because the same business was going on throughout those two years, that is, the merger with the G. M. & N. properties and the M. & O. properties and I might say, it is fairly accurate to say that throughout those two years I devoted practically all of my time to that enterprise and I worked wherever it suited me best to work. It was quite a large undertaking and involved a large amount of work and in connection with it we were in the midst of quite vital litigation with another railroad involving an operation between Paducah, Kentucky and Jackson, Tennessee, a case that was in two or three Courts and I think that was on in 1939, on that case, and perhaps concluded before 1940, but the other matter was on throughout the two years; but it was left to me where I would work and I spent most of my time in Jackson, Mississippi, and I think the records will show from the vouchers that are here, that my secretary was there with me practically all the time where I did most of the work, in Jackson, Mississippi, and that was left to me where I would do my work,

Q. Mr. Flowers, was there anything unusual about the years 1939 and 1940, in so far as you said you spent a substantial part of time—the records show that you spent a substantial portion of time in Jackson, Mississippi—was that customary or was that unusual?

A. Well, the amount of time I spent in Jackson, Mississippi, as compared with Mobile was not the same in that year as it was in other years because we had on hand this matter; there was more work on hand in that time that I could do better in Jackson, Mississippi, than I could do in Mobile, just because these important matters were on, and I say again that it was left to me where I

would do my work; I could go to Mobile and do it or I could stay in Jackson and do it.

Q. In other words, when you were in Jackson during those years, you were not just at home working in the garden—if you work in a garden?

A. No.

Q. Did you keep your office there?

A. Yes.

Q. And you were tending to your duties?

A. Yes.

Q. Mr. Flowers, are you in position to give an estimate or an approximation of how much you consider it cost you to live and pay your room rent, your meals and other incidentals in Mobile, Alabama, a day? Have you had occasion to figure on that from time to time?

A. Why, yes. I did not keep an account or a record—I had continually before me and I would frequently consider when I was in the midst of the thing, how much it was costing me and this item about my expenses to Mobile has been in every income tax return since I have been on the job and every year it was inquired about, and I think I am safe in saying that every year an Examiner came to see me about it and asked for an explanation; and, in fact, I think nearly every year he came to my office to see me, some Examiner, and nobody ever questioned it until the Examiner came along who looked at my return for the year 1939. I mention that because I have had occasion to have it before me all the time and I always explained to them that it was an estimate and they would ask me for some information upon which the estimate was based and I would give them the best I had, but the expense, the travelling expense from Jackson to Mobile—there was no direct route and from Mobile back to Jackson.

Q. How did you go between those two places?

A. I would nearly always come by way of New Orleans and I had a railroad pass but I did not have a Pull-

man pass, and for various reasons I saved time so I could work on the train and there were various considerations of comfort that I had to take into account. I was accustomed to get the best accommodations that I could, whether I paid the expenses or whether I was on trips where the railroad paid the expenses. I have followed that practice in order to save doctors' bills and various things, and I usually carried books back and forth and had considerable luggage nearly always on that account and I, therefore, would always pay the Pullman costs and would get the best accommodations I could, usually, and I did not ride at night without getting a berth.

Q. Was it possible, Mr. Flowers, by train to come from Mobile to Jackson or go from Jackson to Mobile without traveling part of the way at night?

A. No.

Q. What route did you follow—that was through what points?

A. Well, coming from Jackson to Mobile through New Orleans, I had two ways to do it; one is to leave there about 3:00 o'clock in the afternoon and if I made the connection, catch a train for Mobile that night and when I did that I paid two Pullman fares—I paid one for the seat or room, usually, if I could get it, especially if the train was crowded, trying to avoid the crowds, and if I came that way I had two ways of doing it; one was to come to New Orleans and spend a night and catch a train the next morning or the next afternoon to Mobile. Another way was to sleep on the Illinois Central train leaving there at 11:00 o'clock at night, I believe it was, or 11:30, something like that, and coming to New Orleans in the expectation of making connection here. A lot of the time I could not make that connection; sometimes I could.

Q. In other words, you had two Pullman fares to purchase and one of them, in any event, would be a regular made-down berth or room, and there might be no other alternative, or a hotel room in New Orleans.

A. Yes.

Q. Can you give us an estimate of about how much, or an approximation of about how much it would cost you to make such a trip?

A. I have figured on that since this has been up and I have put down my items and it costs from $10.00 to $14.00.

Q. What would make the difference?

A. Well, it would be spending the night in New Orleans.

Q. That is the most expensive trip?

A. That is the most expensive trip and that is true also in coming back. For a while you could come over on an L. & N. train and I don't know whether I could do it at that time or not but if the train was right on time you could catch an 8:50 train out of here to Jackson, Mississippi, at night, a train that is not on now, and it was—I forget how far back it was that the schedules were so changed that that could not be done; I don't remember whether at that time it was or not, but if I did that I got a berth on the train to Jackson, Mississippi, and would get there at 12:00 or 1:00 o'clock.

Q. Then, going back, you had to have a berth?

A. Yes.

Q. Or, I take it, the alternative was to stay in New Orleans all night?

A. Yes.

Q. Mr. Flowers, have you had an occasion to undertake to give an estimate of how much it cost you to live a day in Mobile?

A. Yes, I have. I would say on an average, even with a room rate that I had at that time, or most of the time at least, of $2.75 a day for a room, I figured that my expenses that the minimum average would be around $8.00 a day.

Q. It would range from $8.00 to what?

A. A little in excess of that—I could not say exactly. In fact, the actual cost to me of being in Mobile instead

of at home was largely in excess of that but so much of it is due to just things you spend trying to be comfortable or something that you could not charge and could not count as a part of your necessary expenses, but when I say around $8.00 a day, I would say that is the minimum average, why, that is the way I live, whether I pay my own expenses or the railroad pays them.

Q. Mr. Flowers, in your 1939 return, you estimated and claimed expenses of $900.00 as traveling expenses between Mobile and Jackson and return, and your expenses while in Mobile. Can you say whether or not you considered that a reasonable estimate?

A. Why, I thought so, and I did it, of course, I did this when I was a little closer to it than I am now; I had some data that I could use, like check stubs, that would indicate where I was when I drew checks; that would not throw any light on the amount of the expenses, because you spend so much that you could not include in expenses, but I could locate my whereabouts when I had those expenses and I thought I was within the amount properly attributable to necessary living expenses.

Q. Mr. Flowers, for the year 1940, the amount claimed was $1,620.00 for the same purpose. Would you make the same statement with respect to what you thought about that amount?

A. Yes; I will say it was arrived at the same way; I just took the best information I had before me at the time I made out the return, and did my best to estimate it correctly. I could not swear that it is correct, but it was the best I could do with the data before me. I know it is possible that some years I may have over-estimated it, and other years I probably under-estimated it, but, on the average through the years, I don't think that my claim has been far wrong, and as I say again, I have done it pretty much—I don't know whether I have done it the same way every year or not—I just know that I have made my estimate the best I could from whatever data and

recollection I had before me at the time I made out my return and then, sooner or later, the thing was subjected to an examination by some Examiner who came to see me about it and they have, after they saw that I had, and heard my explanation, they accepted it.

Q. Mr. Flowers, is Jackson, Mississippi, a very important point on the railroad by whom you are employed?

A. Yes, it is the most important point, of course, in the State of Mississippi, and it is still true, even after the merger, that the larger portion of our property is in the State of Mississippi; that is where our main interest is in so far as litigation is concerned, and taxes.

Q. I believe Jackson is the Capital of the State, is it not?

A. Jackson is the capitol, and it is where the Railroad Commission sits and where the Tax Commission is and where the larger portion of our business is in the State."

(Witness continuing):

One case with Illinois Central was in the Federal Court in Jackson. There were hearings in that case in Jackson, and I participated in them—that was in 1939 and 1940. I appeared on behalf of the railroad before the Railroad Commission, but not very often; occasionally, when there is something that I considered of especial importance, or somebody else may think is of especial importance. I actually handled during the years 1939 and 1940 and prior thereto, and even now, the important matters for the railroad before the Interstate Commerce Commission. I actually did the trial work on those days.

Cross Examination.

My office as vice president and general counsel and before that as general counsel for the Gulf, Mobile and Ohio, was at Mobile, Alabama. The railroad with which

I am now connected and also with which I was connected in 1939 and 1940, is in the control of about the same persons that control the Gulf, Mobile and Northern Railroad Company during the years prior to that time. I would say that the control is in the hands of the same executives. The Board of Directors change from year to year.

My appointment as vice president and general counsel is by election each year and not by resolution of the Board of Directors.

"Q. However, in view of your long and successful and satisfactory services with these people in control of the Railroad, you do not have very much fear of not being re-elected each year, do you?

A. Well, I could not use that assumption that you do, very well. I have not always been certain whether they are satisfied with what I do— they sometimes may let you know about it, and sometimes they may not. I could not assume that. I know that it depends upon whether your personal as well as your business relations remain intact and in good shape.

Q. Well, haven't your personal and business relations been very amicable all these years with these officials?

A. Well, I should say fairly—fairly.

Q. Now, the arrangement by which you stated that you perform part of your service for the Railroad in Jackson, Mississippi, was one that the Railroad permitted you to do at your own personal request, was it not?

A. Well, I think you could put it that way; it was mentioned—it was understood that if I took the position, why, I would maintain my home in Jackson.

Q. Yes. However, since the main offices of the railroad were at Mobile, that is where you did the principal part of your work at Counsel for the railroad company, is it not?

A. Well, some years—not these two years. I have explained that in these two years—

Q. Yes, I understand, but generally speaking you do your principal work as Counsel for the Railroad in Mobile, do you not?

A. I would say yes.

Q. You spoke of being a Member of your old firm in Jackson, Mississippi, but as I understand, you did not participate in the profits of that firm in these years, 1939 and 1940, did you?

A. No, not in 1939 and 1940.

Q. Now, the legal work for the railroad company by which you are employed was done by your old firm in Jackson, was it not, that is, they were the Division Counsel?

A. Yes.

Q. What services did they perform?

A. Well, they were responsible for the business that required the services of attorneys in a certain district, say four or five counties, including Hinds; and Hinds County, of course, is the principal county, but they have other Division Counsel; they have these four to five counties for which they are responsible and my firm continued to be, I mean they continue now to be Division Counsel having jurisdiction over—I could not tell you just how many counties—but I could tell you how many, if it is important.

Q. Well, that is not important.

A. They are on a fairly substantial stipend as Division Counsel, but I have no part in that that they receive as General Counsel and I have not any part in anything else they earn, but it has been understood, that has been intact, that understanding, all these years, that if I should lose out on this position or resign or if I should give it up, why, I have preserved my business connections there; all I have to do is just to come back to my office and go on as I was before; that has been the understanding all these years, and that has been a very material consider-

ation with me. I didn't want to lose that reserve and, therefore, kept my connection and kept that understanding alive.

Q. If you made any trips in to Mississippi on business for the Railroad Company other than to Jackson, Mississippi, during these years, I assume that the Railroad Company paid your expenses, did it not?

A. Yes.

Q. The only one where they did not pay your expenses was when you went back and forth from Jackson to Mobile and while you were in Jackson?

A. Yes—not in Jackson.

Q. They did not pay any expenses in Jackson?

A. No.

Q. In the event you went to Jackson in a hearing, say, before the Federal Court, in this case the Railroad Company would not pay your expenses or any part of them while you were there?

A. I don't know that that situation ever arose, but I have the idea that if it had, if I had been in Mobile and the case was coming up in Jackson, and I had to go there for that purpose of attending that trial and coming back to Mobile, I would have charged the Railroad Company for that, because that would have been like anything else, but usually when those matters came up I was already in Jackson and did not get the privilege of charging any expenses to anybody."

Re-Direct Examination.

(By Mr. Ogden):

Since 1927 I have accepted outside employment for which I was paid fees. I have such employment right now. I am engaged in a case right now for somebody other than the railroad.

Because the record shows that I earned no fees in 1939

and 1940, it does not mean that I was not willing to earn something on the side during these years, but I did not have the opportunity. It is only certain kinds of things that I could afford to indulge in in the way of outside law business; it would be something that was largely a law matter, that I could carry around with me, and that could be done at one place as well as at another, something you could do on the train or at night, or odd moments; that is the only kind of thing I could afford to take, and I did not have many such opportunities for a few years after I went on the job of General Solicitor in 1927.

It is true that the railroad does not pay any of my expenses while I am in Jackson.

I had a complete home establishment, including my wife, during 1939 and 1940, and for years prior thereto, which was in operation in Jackson. The whole home organization was kept up and went on intact while I made trips to Mobile. The railroad paid none of those expenses whatever.

(By Mr. Ogden):

"Q. Do you consider, as a general proposition, that the expense of maintaining your home organization in Jackson was any less during, say, a week while you are in Mobile, that that made any material reduction in the amount of those expenses?

A. Well, it would possibly make some, not much; I don't think I could say. I don't know whether they cooked a little less than they did when I was there, or whether the laundry bill was not quite as large; the fixed charges were not in anywise reduced.

Q. Your tax bill wasn't any less?

A. The fixed charges, like water bills, and light bills, and gas bills; the telephone bills, of course, were increased, because they were continually calling me at Mobile, but whatever there was in the way of upkeep and service,

why, and all such things as that, they all went on just the same."

Re-Cross Examination.

(By Mr. Backstrom):

"Q. Judge, in your estimate of expenses at Mobile, you say that the hotel room was about $2.75 a day. Now, the difference between that and your estimate of $8.00 or $8.50 a day was pretty largely your meals while you were there?

A. Mr. Backstrom, if you go through the experience, as you often do, you just find if you are around a hotel you have to pay your way. If you get ice water, you have got to tip the boy; if you get a telegram, you have got to tip the boy that delivers it; if you get a letter, you have got to give a tip; if you call in the maid to bring you an extra towel, where they have overlooked it, in order to get the service, you have got to tip the boy who brings it; you have got to tip the boy who brings your laundry and the man who brings it back, and the man who takes your clothes to the presser, and the man who brings it back. I don't skimp whether I am on my own expense or the Railroad's expense—I don't skimp on things to be comfortable.

Q. Judge, do you recall what your salary was in 1939, from the Railroad?

A. No, I don't offhand; it was changed from time to time.

Mr. Backstrom:

Your Honor, we would like to stipulate in the record that Mr. Flowers' salary from the Gulf, Mobile and Ohio Railroad Company for 1939 was $17,000.00, and the compensation received for 1940 was $25,536.40. The Return shows, "Salary and Director's fees".

The Witness:
Let me see that? Yes, I believe that is correct.

The Court:
The record shows that.

Mr. Backstrom:
That is all.

The Court:
I have a couple of questions that may have been answered; and if they are, they will be in the record, but I am not sure. Did I understand you to say that during these years, while your name was in the firm there in Jackson, you did not participate in the business of the firm?

(The Witness):
A. Not in a pecuniary way, no. Of course, I participated in discussions of matters that might be on hand, but I had no pecuniary interest.

The Court:
You did not share in the profits?

The Witness:
I did not share in the profits.

The Court:
Now, one other question about the Railroad which has its offices in Mobile. Where did it run to and from?

The Witness:
Well, in the year 1939, say, it ran from Mobile, Alabama, to Jackson, Tennessee, and then there was a branch line to Dyersburg.

The Court:
That is Jackson, Tennessee, to Dyersburg, Tennessee?

The Witness:
Yes, sir; and there was a line from Union, Mississippi, which is almost due West from Meridian, Mississippi, extending to Meridian.

The Court:
That would be between Meridian and Jackson?

The Witness:
And a line from Union to Jackson—it used a line from Jackson to Meridian through Union, Union being a point on this main line that runs from Jackson, Tennessee, to Mobile, Alabama.

The Court:
In other words, while Jackson is on the Railroad, it is on a branch line from the main line?

The Witness:
I am not sure.

The Court:
All right.

The Witness:
It is just as important a line as is the continuous line from Jackson to New Orleans—and, in fact, that is perhaps the most important single section of the Railroad. This continues, it is not owned by the G. M. and N., but controlled for 99 years, the same as ownership for all practical purposes.

The Court:
It was a part of the System?

The Witness:

It was a part of the System, yes, so this line from Union, Mississippi, through Jackson runs on to New Orleans and we own large properties in New Orleans, in the way of yards.

The Court:

All right. That is all. Is there anything else?

Re-Cross Examination.

(By Mr. Backstrom):

Q. Judge, after the consolidation then with the Mobile and Ohio, the road then had one main line from Mobile to St. Louis, did it not?

A. Yes, sir; we had another line—a new line from Mobile that took place by virtue of the merger in the latter part of 1940—a new line from Mobile, Alabama, through Jackson, Tennessee, to St. Louis, and a line from Artesia, Mississippi, branching off from that to Montgomery, in the State of Alabama. Now, we have two lines since that merger from Mobile to Jackson, Tennessee—one of the old G. M. and N. and the other the old M. & O.

Mr. Backstrom:

That is all.

The Court:

All right. If there is nothing further, then you are excused.

(Witness excused.)"

The foregoing is all of the material evidence adduced at the hearing before the Tax Court, and the same is approved by the undersigned.

J. N. OGDEN,
Attorney for Petitioner on Review.

J. P. WENCHEL, C.A.R,
(J. P. Wenchel)
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

The foregoing is all of the material evidence adduced at the hearing, and in order that the same may be preserved and made a part of the record, this Revised Statement of Evidence is duly approved and settled this .... day of ....., 1944.

.....
Judge, The Tax Court of the United States.

CRM/csl
11/10/44

Approved and Ordered Filed this 23rd Day of Nov., 1944.

(Sgd.) BOLON B. TURNER,
Judge.

---

57 PRAECIPE FOR RECORD.

Received Oct. 27, 1944.

Filed Oct. 27, 1944.

(Title Omitted.)

To the Clerk of The Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court

of Appeals for the Fifth Circuit, with reference to petition for review heretofore filed by the Petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Tax Court of the United States.

(2) Pleadings before the Tax Court of the United States, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

(3) The findings of fact and opinion of the Tax Court of the United States.

(4) The decision of the Court.

(5) The motion to set aside and vacate the decision and enter decision for petitioner.

(6) The order denying the motion to set aside and vacate the decision and enter decision for petitioner.

(7) The petition for review, filed by the petitioner in the above cause.

(8) The statement of evidence.

(9) This Praecipe.

(Sgd.) J. N. OGDEN,
(J. N. Ogden)
Attorney for Petitioner.

J. N. Ogden,
104 St. Francis Street,
Mobile 5, Alabama.

Service of the above and foregoing is hereby admitted this 20th day of October, 1944.

J. P. WENCHEL, C.A.R.,
(J. P. Wenchel)
Chief Counsel, Bureau of Internal Revenue. Counsel for Respondent on Review.

59 CERTIFICATE.

The Tax Court of the United States, Washington.

J. N. Flowers, Petitioner,
v. Docket No. 3539.
Commissioner of Internal Revenue, Respondent.

I, B. D. GAMBLE, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 58, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 27th day of November, 1944.

B. D. GAMBLE,
(Seal) Clerk, The Tax Court of the United States.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission

Extract from the Minutes of March 7th, 1945.

No. 11242

J. N. FLOWERS

v.

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by James N. Ogden, Esq., for petitioner, and Miss Helen Goodner, Special Assistant to the Attorney General, for respondent, was submitted to the Court.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 11242

J. N. FLOWERS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the Tax Court of the United States (District of Mississippi)

(March 23, 1945)

Before HUTCHESON, HOLMES, and MCCORD, Circuit Judges.

HOLMES, Circuit Judge. This appeal involves income taxes for the calendar years 1939 and 1940. The question presented is whether deductions taken by the taxpayer for traveling expenses between Jackson, Mississippi, his place of residence, and Mobile, Alabama, his principal place of employment, and living expenses while in Mobile, are allowable, under the provisions of Section 23 (a) (1) of the Internal Revenue Code, as traveling expenses while away from home in the pursuit of a trade or business. The Tax Court sustained the Commissioner's disallowance of the deductions.

The taxpayer was born in Mississippi, and has been a citizen of that state all of his life. Early in his career as a lawyer, he moved

to Jackson, and has lived there with his family since 1903. The house that constitutes his present residence is on the same plot of ground where he has lived since 1912. He built that house and, in the usual and ordinary meaning of the word, it is his home. In a broader sense, Jackson may be called his home. His church and club affiliations are there; he has been a qualified voter in Jackson since 1903; there he pays all of his taxes; there, each year since 1903, he has duly paid his license fee to practice law, the only business or profession he has ever had. Since he entered private practice, he has always been a member of a law firm in Jackson, and he is now the senior member of the firm of Flowers, Brown, and Hester, which firm he organized in 1922.

During the years 1939 and 1940, the taxpayer was general counsel and vice-president of the Gulf, Mobile & Ohio Railroad Company, and was in charge of the law business of that company. His duties were of a purely legal nature, and his principal office was in Mobile, Alabama. As an attorney, he had been connected with this company and its predecessors for many years, but had continued to reside in Jackson and to retain his law office there. This was satisfactory to the company, provided he paid his own traveling expenses to and from Mobile and his living expenses while in each of the two cities. During 1939 he spent 203 days in Jackson and 66 in Mobile, making 33 trips between the two places; during 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips. In his income tax returns, he deducted his traveling expenses incurred on those trips. He received no professional income in those years except from the railroad company.

In addition to social reasons, the petitioner had a substantial business purpose in maintaining his home and law office in Jackson. It takes time to acquire a general law practice, and the good will of clients is the most valuable asset a lawyer can have. While his present position with the railroad company seems permanent, he must be elected each year; and there is inherently an element of uncertainty in such a situation. He wanted to keep his professional connections as far as he could, so that he would have a place to go and something to do if he should resign or not be reelected at any time. He could not afford to sever all connections with his clients and acquaintances of many years. He was willing to undergo the hardships of travel and to pay his own expenses, but he declined to move his home or to surrender the good will of his business.

There is no dispute in this case about the facts; the question before us is one of law; the decision turns at least upon the meaning of the word home in Section 23 (a) (1) of the Internal Revenue Code. The Tax Court held that home, as used in this sec-

tion, means the post, station, or place of business, where the taxpayer is employed; and that on these trips the petitioner was not away from home in the pursuit of a trade or calling.

We find no basis for this interpretation. There is no indication in the statute of a legislative intention to give the word an unusual or extraordinary meaning. For the court to do so would be an invasion of the legislative domain. We think the word home as used in the statute means that place where one in fact resides. Home is the fundamental idea of domicile, and yet there is a difference in the legal conception of the two words. Domicile expresses the legal relation existing between a person and the place where he has his permanent home in contemplation of law. Home denotes the principal place of abode of one who has the intention to live there permanently.

A commuter is not deemed away from home while going to and from his work in a nearby town or city; but the petitioner was not a commuter; the cheapest and most convenient means of transportation for him was by way of New Orleans, which was a long and arduous trip, where one often missed connections and had to spend the night in a hotel. If Mobile was the taxpayer's home because his principal post of duty was there, then he either had two homes or he was away from home when he as in Jackson on railroad business. If he had only one home, then with his domicile and citizenship in Mississippi, his home would be in Alabama; at his office in Mobile, he would be at home; at his domicile in Jackson on company business, he would be away from home; but in our view it is unnecessary to indulge in these speculations.

The Government contends that the principal place of employment is a question of fact in each case. Conceding as a matter of fact that the taxpayer's principal office was in Alabama, and that his principal duties were performed there, nevertheless a question of law is presented as to the statutory meaning of the word home. The undisputed facts show that petitioner's home was in Mississippi unless the statute fixes it at the place of employment. There are no facts in this record sufficient to support a finding that the petitioner's home followed his vocation to another state; there is no legal requirement to induce this conclusion; the income-tax statutes envisage a home in which the producer lives with his dependents. When at home, he is allowed to deduct sums estimated to be sufficient to provide him and his dependents with the necessaries of life. While away from home in pursuit of a trade or business, he is allowed to deduct traveling expenses, including the entire amounts expended for meals and lodging.[1]

[1] Coburn v. Commissioner, 138 F. (2) 763; Wallace v. Commissioner, 144 F. (2)

The decision of the Tax Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment

Extract from the Minutes of March 23rd, 1945.

No. 11242

J. N. FLOWERS

v.

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of J. N. Flowers for a review of a decision of The Tax Court of the United States, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decision of the said Tax Court of the United States in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said Tax Court for further proceedings not inconsistent with the opinion of the Court.

Clerk's certificate, United States of America, United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 57 to 63 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 11242, wherein J. N. Flowers is petitioner, and Commissioner of Internal Revenue is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 56 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 12th day of June, A. D. 1945.

[SEAL]

(S) OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1945

Supreme Court of the United States

No. 145, October Term, 1945

Order allowing certiorari

Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON and Mr. Justice BURTON took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE 1945